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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Lion Electric Company,
10 Plaintiff,

11 v.

12 Nikola Corporation,
13 Defendant.

No. CV-23-00372-PHX-DGC

ORDER

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16 The parties disagree on which state’s law governs the attorney-client privilege in
17 this case, Arizona’s or Delaware’s. *See* Doc. 71. Lion challenges some of Nikola’s
18 privilege assertions, and the parties require a resolution of this issue so they can confer
19 about and resolve Lion’s challenge. At the Court’s direction, the parties submitted a joint
20 memorandum setting forth their positions. Doc. 72. After reviewing their arguments, the
21 relevant case law, and six of the communications at issue (that were submitted *in camera*),
22 the Court concludes that Arizona law controls the privilege in this case.

23 “[I]n a civil case, state law governs privilege regarding a claim or defense for which
24 state law supplies the rule of decision.” Fed. R. Evid. 501. State law provides the rule of
25 decision in this diversity case. “Rule 501, however, does not tell us which state law the
26 forum state should apply.” *KL Grp. v. Case, Kay & Lynch*, 829 F.2d 909, 918 (9th Cir.
27 1987). Commentators have suggested several methods for resolving this choice-of-law
28 issue: (1) use the privilege law of the state whose substantive law provides the rule of

1 decision; (2) apply the privilege law of the state in which the federal court sits; or (3) apply
 2 the conflict-of-law doctrine of the state in which the federal court sits. *Id.* (citing 23 C.
 3 Wright & K. Graham, Jr., Federal Practice and Procedure § 5435, at 865-69 (1980); 2
 4 Weinstein’s Federal Evidence § 501[02] (1986)).

5 In this case, the parties agree the Court should apply Section 139 of the Restatement
 6 (Second) of Conflict of Laws. *Id.* at 11, 17. The parties also agree that as between the two
 7 states in question, Delaware has the broader attorney-client privilege law. *Id.* at 2, 11 n.8.
 8 In other words, the parties agree that some communications that would be privileged under
 9 Delaware law would not be privileged under Arizona law. Lion argues that Arizona law
 10 shoulda apply, Nikola argues for Delaware law.¹

11 Section 139 provides that “[e]vidence that is privileged under the local law of the
 12 state which has the most significant relationship with the communication but which is not
 13 privileged under the local law of the forum will be admitted unless there is some special
 14 reason why the forum policy favoring admission should not be given effect.” Restatement
 15 § 139(2). Because the parties agree that Arizona’s privilege law is narrower, this rule
 16 works as follows: If Delaware has the most significant relationship to the communications
 17 in this case, Arizona’s narrower privilege law — the law of the forum — governs unless
 18 there is a special reason Arizona’s policy should not be applied. If Arizona has the most
 19 significant relationship to the communications, its privilege law governs.

20 Comment e to § 139 provides guidance on which state has the most significant
 21 relationship with the communications:

22 The state which has the most significant relationship with a
 23 communication will usually be the state where the communication took
 24 place, which, as used in the rule of this Section, is the state where an oral
 25 interchange between persons occurred, where a written statement was

26 ¹ The difference between Delaware and Arizona law is their treatment of waiver of
 27 the attorney-client privilege. The parties agree that the participation of a financial advisor
 28 in attorney-client communications may waive the privilege under Arizona law, but would
 not waive it under Delaware law. *Id.* The Court has not been asked to address the breadth
 of the Arizona and Delaware privileges or their approaches to waiver.

1 received or where an inspection was made of a person or thing. . . . The state
2 where the communication took place will be the state of most significant
3 relationship in situations where there was no prior relationship between the
4 parties to the communication. If there was such a prior relationship between
5 the parties, the state of most significant relationship will be that where the
relationship was centered unless the state where the communication took
place has substantial contacts with the parties and the transaction.

6 *Id.*

7 For written communications (the only kind at issue in this order), Comment e
8 suggests that the state where the communication was “received” has the most significant
9 relationship. This suggestion, made by the ALI in 1971, is problematic in a day of
10 electronic communications. Email communications — which represent most of the
11 communication at issue here — usually go back and forth between the communicating
12 parties several times in a single email string, resulting in virtually everyone being the
13 “receiving” party for at least some of the communications. Email communications can
14 also be received by people in many states simultaneously, making it impossible to
15 determine which party “received” a communication. Commentators have noted this
16 difficulty with the Comment e approach. *See* Graham C. Lilly & Molly Bishop
17 Shadel, *When Privilege Fails: Interstate Litigation and the Erosion of Privilege Law*, 66
18 Ark. L. Rev. 613, 643 (2013) (“determining the state with the ‘most significant
19 relationship’ may prove problematic with electronic communication”).

20 This case provides an apt example. The communication designated as “Nikola Priv
21 262” includes four emails over the course of three days among eight people in three states:
22 Arizona (location of Nikola personnel), New York (location of financial advisors), and
23 California (location of outside lawyers). Doc. 72 at 22-23. It would make little sense to
24 find that the state with the most significant relationship — and therefore the applicable
25 privilege law — varies from email to email, or maybe even within a single email string,
26 depending on who happens to be copied and who appears to be the primary recipient. The
27 “received” test for written email communications simply does not work in this case.
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1 The second part of Comment e suggests that if the parties to the communication in
2 question had a prior relationship, then the state where that relationship was “centered” will
3 usually be the state with the most significant relationship. This too is unhelpful, as Nikola
4 does not contend that the outside lawyers, financial advisors, and Nikola personnel who
5 participated in the communications had a prior relationship, much less that the relationship
6 was centered in Delaware.

7 The Court must accordingly look to other relevant facts. This case arises out of
8 Nikola’s acquisition of Romeo, a battery manufacturer that made batteries for Nikola and
9 Lion, both of which produce electric vehicles. Lion claims “that Nikola hatched a plan, for
10 purposes of its own commercial interests, to acquire Romeo and force it to breach its
11 existing customer contracts to allow it to service Nikola alone.” *Id.* at 17.

12 Nikola argues that Delaware law should govern the attorney-client privilege because
13 Nikola is a Delaware corporation, Romeo was a Delaware corporation, and the acquisition
14 was governed by Delaware law. But the question is not which state has the most significant
15 relationship with the transaction, but which state “has the most significant relationship with
16 the communication,” Restatement § 139(2), and none of the communications in question
17 occurred in Delaware or involved people in Delaware.

18 Nikola relies on *3Com Corp. v. Diamond II Holdings, Inc.*, No. CIV.A. 3933-VCN,
19 2010 WL 2280734 (Del. Ch. May 31, 2010), but this case is not persuasive. *3Com*
20 purported to apply Restatement § 139, but in fact did not select the state with the most
21 significant relationship to the communication as that section requires. *3Com*
22 acknowledged that “[m]ost of the challenged communications were received by, or
23 originated from, 3Com personnel in Massachusetts,” and even observed that the Comments
24 in § 139 favored selection of Massachusetts law. *Id.* at *5. The court nonetheless chose to
25 apply Delaware for reasons largely unrelated to the communications in question: “The
26 parties selected Delaware law to govern the Merger Agreement, and chose Delaware as the
27 forum for any disputes arising out of the Merger Agreement. Delaware has a considerable
28 interest in ensuring that corporate entities seeking a business combination under its laws

1 may expect consistent and predictable treatment when appearing before its Courts.” *Id.*
2 at *5. Indeed, *3Com* specifically stated that it was considering the “general policy
3 objectives” found in § 6 of the Restatement. *Id.* at *5 n.30. Because the Court does not
4 view *3Com* as applying § 139 faithfully, the Court will not follow it in this case.

5 Lion’s argument is more persuasive. Nikola is headquartered in Arizona and has its
6 principal place of business here (Docs. 1 ¶ 2, 33 ¶ 2), and Nikola officers and in-house
7 attorneys located in Arizona were parties to the communications in question (Doc. 72 at
8 22-23). No participant in the communications was located in Delaware. Further, Arizona
9 is the place from which Nikola would have put questions to and received counsel from its
10 outside lawyers, and the place where it would have implemented their legal advice.

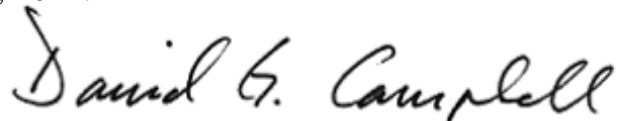
11 The location of the privilege holder is also a relevant factor favoring the selection
12 of Arizona law. As the Court noted in another case:

13 Since privileges primarily benefit their holders — such as a client or patient
14 — identifying the holder should be an important indication of which state
15 has the most significant relationship to the communication. The privilege
16 holder’s affiliation with competing states is of paramount importance and
17 should be a primary factor in determining which state has the most significant
relationship to a communication.

18 *In re: Bard IVC Filters Prods. Liab. Litig.*, No. MDL 15-2641 PHX DGC, 2016 WL
19 3970338, at *4 (D. Ariz. July 25, 2016) (cleaned up) (quoting Graham C. Lilly & Molly
20 Bishop Shadel, *When Privilege Fails: Interstate Litigation and the Erosion of Privilege*
21 *Law*, 66 Ark. L. Rev. 613, 649 (2013)). Nikola holds the privilege in this case and it
22 operates in Arizona, received counsel in Arizona, and acted from Arizona.

23 The Court concludes that Arizona has the most significant relationship with the
24 communications at issue in this case. Under Restatement § 139, the attorney-client
25 privileged will be governed by Arizona law.

26 DATED this 13th day of September, 2024.

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David G. Campbell